STATE OF CALIFORNIA PETE WILSON, Governor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

July 13, 1995

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William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

VIA FEDERAL EXPRESS

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Re: CC Docket No. 94-54

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine

Ellen S. LeVine
Attorney for California

ESL:mal

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services	)	CC Docket No. 94-54

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REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit these reply comments in the above-referenced docket. In this Second Notice of Proposed Rulemaking ("NPRM"), the Federal Communications Commission ("FCC") has tentatively concluded the following: (1) at this time, there is no need to impose a general interstate interconnection obligation on all providers of commercial mobile radio services ("CMRS"); (2) CMRS providers should be required to permit resale of their services, absent a showing that such resale would not be technically feasible or economically reasonable; and (3) as a general matter, all CMRS providers should not be required to interconnect a reseller switch to their networks. The FCC has also sought additional comment on whether it should preempt state-imposed intrastate interconnection obligations.

Consistent with its comments previously filed with the FCC,[1] and in accordance with Section 332(c)(1)(B) of the Omnibus Budget Reconciliation Act ("Budget Act"), 47 U.S.C. § 332(c)(1)(B), the CPUC continues to support a requirement that facilities-based cellular carriers interconnect with switch-based cellular resellers upon reasonable request therefor in order to inject needed price competition into California cellular markets which the FCC itself has acknowledged are not yet fully competitive. In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, PR Docket No. 94-105 (May 19, 1995), Report and Order, slip op. at 8. ("Order Denying CPUC Petition").

At the same time, the CPUC agrees with parties commenting herein that the FCC should not adopt generic rules for interconnection, but should leave it to particular CMRS providers to negotiate the specific terms and conditions of interconnection in a given case. Consistent with longstanding FCC policy, the FCC should place the burden on the carrier from which interconnection is sought to demonstrate that such interconnection is neither economically reasonable nor technically feasible. Absent such showing, a carrier requesting interconnection should be allowed to interconnect.

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1. Comments of the People of the State of California and the Public Utilities Commission of the State of California, CC Docket No. 94-54, dated September 9, 1994.

Finally, the FCC should not preempt a state from adopting measures to foster meaningful competition in intrastate wireless markets not yet fully competitive during the transition to effective competition. The CPUC's program to enable switch-based cellular resellers to interconnect with, and choose only those unbundled, existing network services which they need or want from the facilities-based cellular carriers, should be encouraged, not preempted. Such a program is fully consistent with congressional intent as set forth in the Budget Act, FCC policy and precedent, and the public interest.

I. SWITCHED-BASED RESALE OF CELLULAR SERVICES WILL STIMULATE COMPETITION IN CELLULAR MARKETS THAT ARE NOT YET FULLY COMPETITIVE

The FCC has acknowledged that cellular markets are primarily local in nature. In the Matter of Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., DA 94-1129, Order, slip op. at ¶20 (May 19, 1995) ("[T]he coverage of most cellular systems remains essentially local [because] service is provided within a local or metropolitan area, not regionally or nationally.")

The FCC has further acknowledged that cellular markets are not fully competitive today; cellular service prices in California may be higher than they otherwise would be in fully competitive markets; and cellular carriers in California earn economic rents, with average after-tax returns of 30 percent. Order Denying CPUC Petition at ¶¶ 15, 35, 36 n.92, 117, 126, 134. The FCC has also stated that the market for cellular services will not become effectively competitive for at least two years when the FCC expects personal communications service ("PCS") and specialized mobile radio services ("SMRS") to emerge as viable alternatives to cellular service.[2] Id. at ¶ 32. In the meantime, there will be no competitive alternatives to cellular services in California to place downward pressure on intrastate cellular service prices, and thus give customers a meaningful choice among cellular service plans.

Faced with these facts, and in order to stimulate price competition in intrastate cellular service markets during the transition to effective competition from alternative providers, the CPUC has adopted a program to enable switch-based resellers to interconnect with the incumbent facilities-based cellular carriers. [3] Towards this end, as set forth in our earlier comments, the CPUC has ordered the facilities-based cellular carriers to unbundle existing services currently sold to the reseller on a bundled basis, and to price each separately so that switch-based resellers can purchase only those services which they want or need, including those that can be competitively

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2. Viability will not occur until PCS and/or SMRS is widely deployed, available to customers, and fully substitutable for cellular service.

3. Switchless resellers are limited in their ability to compete on the basis of price because the value added by resellers is confined to retailing, billing, and in some cases, installation.

acquired elsewhere.[4] For example, unbundling will enable switch-based resellers to purchase interconnection service with the public switched network directly from the local exchange carrier instead of buying such service on a bundled basis with other services from the cellular carrier.[5]

The CPUC has also ordered a trial of the reseller switch to determine the technical feasibility of interconnection. The CPUC, however, has not mandated the specific terms and conditions of interconnection, but has left it to the facilities-based carrier and the reseller to negotiate such matters in good faith. Private negotiations between Los Angeles Cellular Telephone Company ("LACTC") and a group of resellers have concluded and the technical trial is currently underway and expected to be completed on or about July 18. To date, the trial has produced no major disruptions nor otherwise caused harm to the cellular network. This is not surprising given that the reseller switching equipment is provided by LACTC's own supplier, Eriksen, and is thus fully compatible with LACTC's switches and other equipment.

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4. Contrary to the exaggerated and unsupported assertions of the incumbent providers of cellular services, the CPUC has ordered the unbundling only of existing cellular services -- a paper transaction. The CPUC has not required facilities-based carriers to reconfigure or upgrade their networks, or to offer new services.

5. In denying the CPUC petition, the FCC has preempted the CPUC from regulating the charges for these unbundled elements, but has not preempted (and should not preempt) the CPUC from requiring unbundling of existing services to permit interconnection to foster competition and customer choice.

Predictably, notwithstanding the CPUC's program to stimulate price competition in intrastate cellular markets not yet fully competitive, the incumbent cellular carriers urge the FCC to preempt state regulation that imposes an intrastate interconnection obligation on them. Specifically, they urge the FCC to preempt California's ongoing effort to require minimal unbundling of existing cellular service interconnection elements, to require cellular carriers to interconnect with switch-based resellers upon reasonable request, and to test the technical feasibility of switch-based resale in intrastate cellular service markets. The cellular carriers claim that unbundling and interconnection are not necessary to foster competition and are otherwise too costly and not technically infeasible.

These claims, mounted by entrenched carriers which have no incentive to promote effective competition in their markets, are completely speculative and without factual support. Indeed, the ongoing technical trial of the reseller switch flatly contradicts many of their claims about the scope and effect of the CPUC program.[6] The fact remains that meaningful price competition in not yet fully competitive California cellular markets necessarily depends on allowing switch-based resellers to interconnect with, and purchase unbundled network services from,

6. For example, both AirTouch and the Cellular Telecommunications Industry Association ("CTIA") trot out unsupported arguments that additional equipment, software upgrades, and trunks would be required to enable switch-based resellers to interconnect. AirTouch at 21; CTIA at 32, 37-38. In fact, no such requirements are part of the CPUC's program, as the ongoing technical trial demonstrates.

the facilities-based cellular carriers during the next few transitional years. The CPUC's narrowly-tailored program therefore should be encouraged, not preempted.

II. SWITCH-BASED RESALE IS CONSISTENT WITH FEDERAL POLICY TO PROMOTE THE RIGHT OF INTERCONNECTION IN ORDER TO FOSTER COMPETITION

As CMRS providers, cellular carriers are treated as common carriers under the Budget Act. Section 332(c)(1). As such, under Sections 201 and 202 of the Communications Act, cellular carriers must offer their services on a non-discriminatory basis, and must provide interconnection to a CMRS provider upon reasonable request therefor. The FCC may not forbear from applying these provisions. 47 U.S.C. §332(c)(1)(A); In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order at ¶239 n.489.

Both the language of the Budget Act and its history evidence Congress' express intent that the FCC promote interconnection to enhance competition in wireless markets. Specifically, under Section 332(c)(1)(B) of the Budget Act, Congress emphasized its command in Section 201 of the Communications Act by providing:

> Upon reasonable request of any person providing commercial mobile radio service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

47 U.S.C. § 332(c)(1)(B).

In explaining its intent under this section, Congress made clear that "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." House Report No. 103-111 at 261 (emphasis added).

To be sure, the FCC itself has considered the right of interconnection to be critical in stimulating competition. Nearly four decades ago, the FCC found a right of interconnection to common carrier networks, even by those who are private carriers. Hush-A-Phone Corp. v United States, 238 F.2d 266 (D.C. Cir. 1956) (FCC expressly recognized right of a customer to use its equipment in ways that are privately beneficial without being publicly detrimental). More recently, in both its Open Network Architecture and Expanded Interconnection proceedings, the FCC has ordered the unbundling of local exchange network services, features and functions, and promoted the physical interconnection of competitive providers of enhanced services and access services to enable effective competition with local exchange carriers offering similar services.

The District Court administering the Modification of Final Judgment ("MFJ") has likewise recognized the value of interconnection in promoting competition in various markets. In an Order dated April 28, 1995 in United States of America v. Western Electric Co., Inc., Civ. Action No. 82-0192, the court allowed the wireless affiliate of a Bell Operating Company ("BOC") to offer cellular interexchange access services, but only when at least one non-BOC had the ability to interconnect with the Mobile Telephone Switching Office of the affiliated BOC -- the "mobile bottleneck" network facility of the BOC cellular affiliate -- and provide competing interexchange access services. United States of America v. Western Electric Co., Inc., slip op. at 7.

The incumbent cellular carriers stand in the shoes of AT&T pre-divestiture and the local exchange carriers ("LECs") today vis a vis their competitors. Like the LECs, the cellular carriers control an essential facility -- in this case, the mobile bottleneck. And like the LECs' local exchange markets, the cellular carriers face no real price competition in their markets today, and are unlikely to in the next few years until meaningful competition from PCS and SMRS is expected to develop.

The FCC itself has recognized the public policy benefits of promoting interconnection to dominant, facilities-based carriers, and reiterated their application to this proceeding:

> As a general matter, we believe that the interconnectivity of mobile communications networks promotes the public interest because it enhances access to all networks, provides valuable network redundancy, allows for greater flexibility in communications, and makes communications services more attractive to consumers. It is a further step toward a ubiquitous "network of networks." [footnote omitted] Under appropriate circumstances, we believe that CMRS-to-CMRS interconnection can promote the efficient provision of service to consumers at reasonable prices and will promote and achieve the broadest possible access to telecommunications networks and services by all telecommunications users.

Second NPRM at ¶28.

The purpose and goals of the CPUC program to enable switch-based resellers to interconnect with facilities-based cellular carriers are squarely consistent with all of the above. The scope of the CPUC program -- limited unbundling of existing network services and reliance on private negotiations and arrangements governing the terms and conditions of interconnection -- also comports with FCC policy for regulators to play a guiding, but unobtrusive role in carrier transactions.

Accordingly, the FCC should allow the CPUC program to proceed. The claims of the incumbent facilities-based cellular carriers in the wireless market, strikingly reminiscent of those raised by AT&T almost forty years ago seeking to protect its entrenched position in the wireline market, and more recently by local exchange carriers against competitive access providers, are no more valid today than they were then.[7] As the FCC has consistently found, and should similarly find here, the right of physical interconnection with a facilities-based carrier's network is presumptively in the public interest absent a contrary showing by the carrier opposing such interconnection.

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7. Indeed, contrary to express FCC policy in favor of resale, AirTouch rails against any non-facilities-based competition in general, and provides no evidentiary support whatsoever for its argument that "reseller switches do not result in increased competition or lower prices for consumers." AirTouch at 21-22.

CONCLUSION

For the reasons stated here and in the CPUC's earlier comments herein, the CPUC's narrowly-tailored switch-based reseller program is fully consistent with federal policy to promote effective competition and meaningful consumer choice. The FCC should therefore allow the program to proceed.

Dated: July 13, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 13th day of July, 1995 a true and correct copy of the foregoing REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA was mailed first class, postage prepaid to all known parties of record.

Ellen S. LeVine

Ellen S. LeVine

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